

Durham Research Online

Deposited in DRO:

28 April 2015

Version of attached file:

Accepted Version

Peer-review status of attached file:

Peer-reviewed

Citation for published item:

McCann, D. (2010) 'Decent working hours as a human right : intersections in the regulation of working time.', in Human rights at work : perspectives on law and regulation. Oxford ; Portland, Oregon: Hart, pp. 509-528. Oñati international series in law and society.

Further information on publisher's website:

<http://www.hartpub.co.uk/books/details.asp?isbn=9781841139999>

Publisher's copyright statement:

Additional information:

Use policy

The full-text may be used and/or reproduced, and given to third parties in any format or medium, without prior permission or charge, for personal research or study, educational, or not-for-profit purposes provided that:

- a full bibliographic reference is made to the original source
- a [link](#) is made to the metadata record in DRO
- the full-text is not changed in any way

The full-text must not be sold in any format or medium without the formal permission of the copyright holders.

Please consult the [full DRO policy](#) for further details.

Decent Working Hours as a Human Right: Intersections in the Regulation of Working Time

DEIRDRE MCCANN*

INTRODUCTION

Working life across the world continues to involve working hours that are long, unpredictable or performed during periods that workers would expect to devote to their families or other elements of their lives. The failure of labour law to protect these workers persists, and is even intensifying as responses to the pressures of globalisation embrace a paradigm of flexibility that valorises unhealthy and antisocial hours.¹ It has long been apparent that labour law must be strengthened if it is to play an effective role among strategies to remedy the downside of work in the globalised economy, and efforts to identify, reinforce and reinvigorate methods of protecting workers are now intense. These endeavours, whether to highlight new or overlooked policy objectives, find ways of reinforcing existing labour laws or identify techniques to complement or replace traditional approaches, embrace an attentiveness to the potential of recognising the status of labour rights as human rights, and of recourse to the forums and techniques of human rights law.

The debates about how to advance and reinforce labour law through human rights law, however, are not usually directed towards improving working conditions, despite the prominence of conditions of work in the widespread unease about the impact of globalisation. The subjects of this Chapter, working time protections, have been central to labour law since its inception and can claim a secure position in human rights instruments. Yet, the interrelationship between the treatment of working time in the labour and human rights traditions is rarely discussed in either of their literatures. This Chapter attempts to take a first step towards evaluating the potential of the human rights dimension of working time regulation to come to the aid of workers in the global economy. The goal is not to present a wide-ranging review of all of the points at which labour law and human rights law intersect in the regulation of working time or to craft any definitive conclusions about the relative merits of the two regimes. Instead, given that this has been an under-examined interaction, the aim is to focus on a number of the concerns shared by labour law and human rights regimes, identify overlaps in certain of the subjects they regulate and techniques they deploy, and suggest some ways in which they can enrich and reinforce each other.

The Chapter first examines the status of working time rights as human rights at the international level, including in the International Labour Organisation (ILO) standards. It next highlights the renewed interest in the role of working time rights as among a set of minimum entitlements envisaged for workers across the world, in particular by the ILO's Committee of Experts on the Application of Conventions and

* University of Aberdeen, UK. I am grateful to the comments of the editors, the workshop participants, in particular Jill Murray, and Sangheon Lee for their comments on an earlier draft. This chapter is current as of 1 May 2009.

¹ On industrialised countries, see Golden, L and Figart, DM, *Working Time: International Trends, Theory and Policy Perspectives* (London, Routledge, 2000); Houesman, S and Nakamura, A (eds) *Working Time in Comparative Perspective* (Kalamazoo, Mich., WE Upjohn Institute for Employment Research, 2001); Messenger, JC (ed) *Working Time and Workers' Preferences in Industrialised Countries: Finding the Balance* (London, Routledge, 2004). For a review of working time policies and practice in developing and transition countries, see Lee, S, McCann, D and Messenger, J, *Working Time Around the World* (Geneva, ILO, 2007).

Recommendations (CEACR), and assesses the strength of one element of this ‘social floor,’ limits on weekly working hours. The Chapter then explores key areas in which the intersections between the fields of labour law and human rights law are currently significant in the area of working time, focusing on trends in the regulation of mandatory overtime work and measures that allow individual workers to adapt their work schedules in line with their needs.

THE LIMITATION OF WORKING HOURS AS A HUMAN RIGHT

If the nature of the right to limitation of working hours is assessed solely by its presence in the international human rights texts, its status is apparent. The Universal Declaration of Human Rights (UDHR) recognises that,

Everyone has the right to rest and leisure, including a reasonable limitation of working hours and periodic holidays with pay.²

The International Covenant on Economic, Social and Cultural Rights (ICESCR), while shifting the focus slightly from preserving time outside of work by configuring working time protections as elements of a right to ‘just and favourable’ working conditions, reiterates the protections of the UDHR and adds a right to remuneration for public holidays.³

Working time rights are also recognised at the regional level. The Revised European Social Charter 1996 (RevESC),⁴ Charter of Fundamental Rights of the European Union (the EU Charter)⁵ and Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights 1988 (the Protocol of San Salvador)⁶ all contain rights to daily and weekly hours limits, weekly rest periods and annual leave. Indeed, the RevESC and Protocol of San Salvador build on the international instruments, in that they are more extensive and certain of their rights are elaborated in more detail. Moreover, working time rights, in the shape of specific daily and weekly hours limits or broader entitlements to maximum hours and rest, are protected as constitutional rights in a number of countries, an approach that is particularly prominent in Latin America,⁷ and in Central and Eastern Europe.⁸

There has been some debate, however, as to whether the International Labour Organisation (ILO) standards can be conceived of as protecting or advancing human rights. Indeed, the status of the working time instruments in particular is necessarily complex. The early standards on daily and weekly hours limits⁹ and weekly rest¹⁰

² Art 24.

³ Art 7(d).

⁴ Art 2.

⁵ Art 31(2).

⁶ Art 7.

⁷ Eg Argentina, Costa Rica, Cuba, El Salvador, Guatemala, Mexico, Nicaragua, Panama, Paraguay, Peru, Venezuela.

⁸ Eg Bulgaria, Latvia, Lithuania, the Slovak Republic. On the constitutionalisation of social rights see Estlund, CL, ‘An American Perspective on Fundamental Labour Rights’ and Araki, T, ‘The Impact of Fundamental Social Rights on Japanese Law’ in B Hepple (ed), *Social and Labour Rights in a Global Context: International and Comparative Perspectives* (Cambridge, Cambridge University Press, 2002), 192 and 215.

⁹ Hours of Work (Industry) Convention, 1919 (No. 1); Hours of Work (Commerce and Offices) Convention, 1930 (No. 30); Forty-Hour Week Convention, 1935 (No. 47).

preceded the post-War evolution of international human rights law, rendering the nature of their protections difficult to classify. It is well known, for example, that the instrumental goal of protecting existing domestic regulations has been among the rationales for ILO standards.¹¹ Indeed, this objective can be seen as an element of the warning in the ILO Constitution that,

the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries.¹²

In contrast, as Macklem has pointed out, human rights instruments are conceptualised as protecting 'universal elements of what it means to be a human being', rather than defending the domestic rights of workers against international competition.¹³

This desire to avert destructive regulatory competition, however, has been accompanied by another rationale for international standards, which is encapsulated in the Constitution's opening statement that 'universal and lasting peace can be established only if it is based upon social justice.'¹⁴ This statement is followed in the Constitution by a recognition of the existence of unacceptable working conditions and a call for urgent improvements, including through the regulation of working hours¹⁵; the warning of the potential for a race-to-the-bottom in labour standards is situated after these concerns and phrased as in addition to them.¹⁶ The social justice objective, then, can convincingly be interpreted as an 'over-arching goal' of ILO standards,¹⁷ and is also in line with the imperative on which human rights instruments are grounded, that certain rights must be considered universal.¹⁸ Moreover, the pursuit of social justice appears to have been the dominant goal of the earliest set of ILO standards adopted in 1919, which included the first working time instrument, the Hours of Work (Industry) Convention, 1919 (No. 1).¹⁹

The social justice objective was not prominent in the debates around the later working hours standard, the Forty-Hour Week Convention, 1935 (No. 47), attention having shifted during the depression towards the potential for working time reductions to create jobs. Subsequently, however, the ILO reinforced this orientation

¹⁰ Weekly Rest (Industry) Convention, 1921 (No. 14); Weekly Rest (Commerce) Recommendation, 1921 (No. 18).

¹¹ See, eg Murray, J, *Transnational Labour Regulation: The ILO and EC Compared* (The Hague, Kluwer, 2001) 16-25 and Macklem, P, 'The Right to Bargain Collectively in International Law: Workers' Right, Human Right, International Right?' in P Alston (ed) *Labour Rights as Human Rights* (Oxford, Oxford University Press, 2005).

¹² Preamble, third recital.

¹³ Macklem, above n 11, at 70.

¹⁴ Preamble, first recital.

¹⁵ Preamble, second recital.

¹⁶ Preamble, third recital.

¹⁷ Murray, above n 11, at 28. See also Leary, VA, 'The Paradox of Workers' Rights as Human Rights' in LA Compa and SF Diamond (eds), *Human Rights, Labor Rights, and International Trade* (Philadelphia, University of Pennsylvania, 1996).

¹⁸ Murray suggests that the concept of universalism is undercut by articles in the Constitution that qualified the ILO's powers in order to protect national differences in labour conditions, above n 11, at 37 and 39.

¹⁹ See, eg Murray, above n 11, at 42-3. The other Conventions adopted in 1919 were the Unemployment Convention, 1919 (No. 2); Maternity Protection Convention, 1919 (No. 3); Night Work (Women) Convention, 1919 (No. 4); Minimum Age (Industry) Convention, 1919 (No.5); and Night Work of Young Persons (Industry) Convention, 1919 (No. 6).

in the Declaration of Philadelphia of 1944, which stresses that labour is not a commodity²⁰ and reiterates the goal of social justice, envisaged to entail that,

all human beings have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity.²¹

The Declaration, then, embodies 'a view of the inherent value of social rights in enabling true liberty, self-fulfilment and well-being to be realised.'²² And subsequently, the ILO has emphasised this vision of its role, and the intersections between labour rights and human rights, in various elements of its work.²³ Although the centrality of this approach has varied, in recent years it has been a prominent strand of the Organisation's 'decent work agenda,'²⁴ which outlines a role for the ILO that is grounded in the social justice objectives of the Declaration of Philadelphia²⁵ and stresses the Organisation's contribution to the promotion of human rights.²⁶ The intersection of labour rights and human rights has also recently been stressed specifically with respect to the working time standards, as is discussed below.

It is possible, then, for the ILO's working time standards to be read as advancing human rights protections. Indeed, when viewed in this light, these Conventions and Recommendations can be seen as expressing as specific standards the broader working time rights enumerated in the international and regional human rights instruments.²⁷ Thus, rights to reasonable limitations of working hours, for example, have been embodied in the ILO regime initially as an 8 hour day and 48 hour week,²⁸ and later as a 40 hour week²⁹; the right to weekly rest is in the form of the right to at least twenty-four hours to be taken in principle on the traditional or customary rest day³⁰; the entitlement to a paid holiday is pinned down as a right to paid leave of at least three weeks³¹; and the call for measures to protect night workers has been responded to most recently in the elaboration of a range of protections from regular health assessments to the provision of alternative schedules for pregnant workers and new mothers and compensation that recognises the nature of night work.³² Among their other roles, then, the ILO standards on working time can be viewed as concrete expressions of the broader prescriptions of human rights documents, embodying the spirit of these instruments and advancing their goals by translating them into more

²⁰ Declaration of Philadelphia of 1944, s I(a).

²¹ Declaration of Philadelphia of 1944, above n 20 at s II(a).

²² Hunt, J, 'Fair and Just Working Conditions' in T Hervey and J Kenner (eds), *Economic and Social Rights Under the EU Charter of Fundamental Rights- A Legal Perspective* (Oxford, Hart, 2003), 50.

²³ Leary, above n 17, at 26.

²⁴ International Labour Office, *Decent Work*, Report of the Director-General, International Labour Conference (87th Session), (Geneva, International Labour Office, 1999).

²⁵ The primary goal of the ILO has been identified as 'promot[ing] opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and human dignity.' Decent Work report, above n 24 at 3.

²⁶ Decent Work report, above n 24 at 14.

²⁷ Valticos, N, 'International Labour Standards and Human Rights: Approaching the Year 2000' (1998) 137 *International Labour Review* 135.

²⁸ Conventions Nos. 1 and 30, above n 9.

²⁹ Convention No. 47, above n 9.

³⁰ Convention No. 14, above n 10; Weekly Rest (Commerce and Offices) Convention, 1957 (No. 106).

³¹ Holidays with Pay Convention (Revised), 1970 (No. 132).

³² Night Work Convention, 1990 (No. 171).

specific entitlements. It is in this capacity that they have become prominent in the debate on the role of social rights in the global economy.

GLOBALISATION AND SOCIAL RIGHTS: WORKING HOURS LIMITS IN THE 'SOCIAL FLOOR'

In recent years, the role of social rights as a set of entitlements recognised at the international level that should be reflected as a minimum in domestic legal regimes has been given new life, as part of the quest to address the mistreatment of workers in the globalised economy.³³ This development has been observed to entail a shift within international human rights law, from being conceptualised as protecting the individual against the power of the state to being relied on to police the international legal order.³⁴ With respect to international labour law, however, the revived role for social rights can be seen as a persistence of the dual function ascribed to the ILO standards, as both fundamental human rights and a brake on any downward spiralling of labour protections.³⁵ Moreover, it implies that the working time rights reflected in the international standards, and the domestic laws that embody them, are available to form part of the envisaged 'social floor' for the global economy.

A parallel trend over the last decade, however, has been towards differentiating social rights and designating some, although not those on working conditions, as 'fundamental.' Hunt has observed this dynamic in the drafting of the EU Charter, during which it was contended that working conditions and unfair dismissal rights were not sufficiently fundamental to be included.³⁶ With respect to the international standards, this distinction emerged with the adoption of the ILO Declaration on Fundamental Principles and Rights at Work in 1998, which designated a 'core' set of standards, on freedom of association and collective bargaining, forced labour, child labour, and discrimination. The response to the Declaration has been in part a promising degree of acceptance of the fundamental principles and their recognition in laws and collective agreements, codes of practice and transnational instruments.³⁷ The risk, as Alston and Heenan have pointed out, is that the measures required by the core standards could be perceived as the necessary elements of labour market regulation, rather than as an absolute minimum of protection;³⁸ and consequently that the other protections in the international labour code, including those on working time, could be viewed as peripheral.³⁹

The ILO's Committee of Experts on the Application of Conventions and Recommendations (CEACR or Committee), however, has recently offered a counterweight to the signs of the fading significance of working time rights, in its General Survey on the original working hours standards, Conventions Nos. 1 and 30.

³³ See, eg Hepple, B, 'Introduction' in Hepple, above n 8.

³⁴ Macklem, above n 11, at 84.

³⁵ For an alternative account of the role of international labour law, see Langille in this volume.

³⁶ Hunt, above n 22 at 48-9.

³⁷ See, eg Hepple, B, 'A Race to the Top? International Investment Guidelines and Corporate Codes of Conduct' (1999) 20(3) *Comparative Labor Law and Policy Journal* 347.

³⁸ Alston, P and Heenan, J, 'Shrinking the International Labor Code: An Unintended Consequence of the 1998 ILO Declaration on Fundamental Principles and Rights at Work?' (2004) 36 *New York University School of Law Journal of International Law and Politics* 221. See also Hunt, above n 22, at 48-9.

³⁹ This risk may be to some degree averted by the adoption in 2008 of the Declaration on Social Justice for a Fair Globalization, which stresses the breadth of the ILO's 'strategic objectives' – employment promotion, social protection, social dialogue and tripartism, and the fundamental rights and principles – and asserts that these goals are 'interrelated, inseparable and mutually supportive.' Section IB.

While identifying certain elements of these instruments it considered outdated, the CEACR strongly asserted the vision of working hours limits as human rights. It referred to the rights to limitations of working hours and to rest found in the international and regional human rights instruments, citing both the UDHR and the ICESCR.⁴⁰ Further, the Committee explicitly identified a ‘human rights perspective’ on working time regulation, which embraces its primary rationales of preserving health and safety and ensuring adequate time for social and family life.⁴¹ The Committee concluded that Conventions Nos. 1 and 30,

have set forth principles which have been widely followed and have become part of the list of the fundamental rights of human beings and their dignity.⁴²

The CEACR also captured the universality inherent in the human rights dimension of working time law, by affirming one of the rationales for internationally designated working time rights, that every worker in the global economy is entitled to limits on their working hours and minimum rest periods ‘regardless of where she or he happens to be born or to live.’⁴³

Given this renewed focus on working time protections, then, a compelling question is the extent to which they currently fulfil the role envisaged for them. If this question is addressed by taking into account the ratification of the international standards, the influence of the rights they contain does not appear to be substantial. The working hours Conventions that prescribe an eight hour day and 48 hour week, Nos. 1 and 30,⁴⁴ have been ratified by a total of 50 Member States; and the Forty-Hour Week Convention, 1935 (No. 47) by only 14. However, although ratification of the international Conventions is a significant element in advancing the proposed social floor, by ensuring a visible, and supervised, commitment to social rights at the international level, the related domestic measures are also significant, since it is plausible that the international instruments, and in particular the primary standards they contain, are influential even in the absence of ratification.⁴⁵

Indeed, domestic laws offers a healthier picture of progress towards a ‘social floor,’ at least with respect to working time rights. Taking as an example one of the most fundamental elements of working time regulation, limits on normal weekly hours, a recent review of domestic standards in more than 100 countries found almost all to have generally-applicable limits.⁴⁶ In these countries, the 40 hour week called for by Convention No. 47 is the most prevalent standard: around half have a 40 hour or lower limit. Moreover, the trend has been towards reductions in hours limits since

⁴⁰ International Labour Office, *Hours of Work: From Fixed to Flexible?*, Report of the Committee of Experts on the Application of Conventions and Recommendations, (Geneva, International Labour Office, 2005), para 318. (ILO *Hours of Work*)

⁴¹ ILO *Hours of Work*, above n 40 at para 317.

⁴² ILO *Hours of Work*, above n 40 at para 319.

⁴³ ILO *Hours of Work*, above n 40 at para 317.

⁴⁴ Above n 9.

⁴⁵ The CEACR has suggested that the impact of ILO Conventions should not be measured exclusively by the number of ratifications. ILO *Hours of Work*, above n 40, at para 327. See also Lee, S and McCann, D, ‘Measuring Working Time Laws: Texts, Observance and Effective Regulation’ in D Kucera and J Berg (eds), *In Defence of Labour Market Institutions: Cultivating Justice in the Developing World* (ILO and Palgrave Macmillan, 2008).

⁴⁶ This section is derived from a comparison of legislation in 102 countries in Lee, McCann and Messenger above n 1.

the late 1960s, including over the last decade. An examination of national-level standards, then, reveals weekly hours limits to remain vigorous in domestic law, to an extent that is perhaps surprising when compared to the ratification rates of the international standards. Indeed, there is a broad international consensus in favour of the limit found in the least-ratified standard, the 40 hour week.⁴⁷

A consideration of domestic laws, then, lends substance to the quest for a floor of working time protections by offering evidence of their already significant presence. This suggests that a primary task for future research is to analyse in more detail the factors that contribute towards deviation from the enacted standards, in particular in developing countries, in order to gauge which policies would enable the legal protections to be more closely reflected in actual working hours.⁴⁸ It also highlights the merits of an analysis of social rights that takes into account not only the relationship between international labour standards and human rights instruments, but also the role of domestic laws. When national measures are conceptualised as enforcement mechanisms that give life to social rights in domestic legal regimes, it highlights their role and thereby the strength of many elements of the social floor, and thus avoids understating the degree of resistance at the national-level for calls for these rights to be removed.⁴⁹ This kind of consideration of the interaction between different forms and levels of regulation is also useful in examining the relationship between one of the ILO's fundamental principles, the elimination of forced labour, and domestic laws on working time, which is explored in the following section.

REGULATING MANDATORY OVERTIME WORK

Despite the concerns outlined above about the partitioning of the international labour code, working time is not entirely exiled from the realm of the fundamental principles. One of the subjects of modern working time law, mandatory overtime work, has in recent years emerged as a concern under the international standards on forced labour. This form of overtime, rather than being voluntarily chosen or agreed to, is required by the employer; the worker is, explicitly or implicitly, subject to a sanction for refusing to work beyond normal hours, which can range from being assigned to a less desirable task or shift or missing out on promotion to being dismissed.⁵⁰

The ILO's Forced Labour Convention, 1930 (No. 29) and Abolition of Forced Labour Convention, 1957 (No. 105) prohibit 'forced or compulsory labour,' defined as,

⁴⁷ This is also the CEACR's preferred limit. In the 2005 General Survey, it offered suggestions for any future international instrument on working time, including that the objective of the 40 hour week should be retained, coupled with 48 hours as a maximum limit on total hours, including overtime. Para 332(g).

⁴⁸ See also Lee and McCann, above n 45.

⁴⁹ Deregulatory approaches to working time laws have been particularly strongly advanced in recent years by the World Bank in its 'Doing Business' project. See, for example, World Bank, *Doing Business 2009* (Washington DC, World Bank, 2008).

⁵⁰ For a discussion of mandatory overtime in the context of an industrialized economy, see Golden, L and Jorgensen, H, 'Time After Time? Mandatory Overtime in the US Economy' (2002) 1 *Economic Policy Institute Briefing Paper*, January 2002, available at <<http://www.epinet.org/content.cfm/>> accessed 30 April 2009; Golden, L and Wiens-Tuers, B, 'Mandatory Overtime Work in the United States: Who, Where, and What?' (2005) 30 *Labor Studies Journal* 1.

all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.⁵¹

The forms of forced labour addressed under these instruments have included longstanding and egregious abuses such as chattel slavery, abduction, bonded labour and other work performed subject to threats of violence or imprisonment.⁵² In 1997, however, the CEACR addressed compulsory overtime in response to a question raised by the governments of Canada and Turkey as to its compatibility with Convention No. 29, pronouncing the requirement to work overtime to be compatible with the Convention 'so long as it is within the limits permitted by national legislation or collective agreements.'⁵³ The Committee has since built on this terse statement to indicate some of the circumstances in which it considers mandatory overtime to constitute forced labour.⁵⁴ This development has been particularly pronounced in its investigation of complaints from Guatemala about unpaid overtime required under threat of dismissal or through production targets that compel workers to work extra hours in order to earn the minimum wage.⁵⁵ In this context, the CEACR has concentrated on the element of compulsion,

The Committee notes the vulnerability of workers who in theory have the choice of not working beyond normal working hours, but for whom in practice the choice is not a real one in view of their need to earn at least the minimum wage and retain employment. This then results in the performance of unpaid work or services. The Committee considers that in such cases the work or service is imposed through the exploitation of the worker's vulnerability, under the threat of a penalty, namely dismissal or remuneration below the minimum wage rate.⁵⁶

The CEACR, then, has interpreted the penalty facet of the definition of forced labour in the ILO standards to embrace the sanctions that can be used to require overtime work. In doing so, the Committee is forging a concept of forced labour that is capable of capturing certain aspects of its evolution over recent decades. The ILO's 2005 *Global Report* on forced labour has traced the emergence of these newer forms, often found alongside the 'traditional' versions, in which the element of coercion takes the form of financial penalties.⁵⁷ It highlights widespread reports from South

⁵¹ Forced Labour Convention (No. 29), 1930 Art 2(1).

⁵² See International Labour Office, 'A Global Alliance Against Forced Labour. Global Report Under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work 2005' (Report of the Director-General International Labour Conference (93rd Session) 2005 Report I(b), (Geneva 2005), at paras 32-5. (International Labour Office 'A Global Alliance').

⁵³ International Labour Office, 'Report of the Committee of Experts on the Application of Conventions and Recommendations', International Labour Conference (86th Session) 1998 Report III (Part 1A), (Geneva, International Labour Office, 1998), para 107.

⁵⁴ See generally International Labour Office, *Eradication of Forced Labour*, Report of the Committee of Experts on the Application of Conventions and Recommendations, (Geneva, International Labour Office, 2007), paras 132-134, 206.

⁵⁵ Individual Observations concerning Convention No. 29, Forced Labour, 1930 Guatemala (ratification: 1989) Published: 2004, 2005, 2008. See also Individual Observations concerning Forced Labour Convention, 1930 (No. 29) El Salvador (ratification: 1995) Published: 2004, 2006, available from <<http://www.ilo.org/ilolex/english/iloquery.htm>> accessed 30 April 2009.

⁵⁶ Individual Observation concerning Convention No. 29, Forced Labour, 1930 Guatemala (ratification: 1989), 2004.

⁵⁷ International Labour Office, 'Global Alliance', above n 52, at paras 14 and 32-3.

Asia, for example, of assembly plants in export processing zones where overtime is often required without additional pay under the threat of penalties that include dismissal.⁵⁸ Similar concerns have also emerged in the *maquiladora* assembly industries in the export processing zones of Central American and Andean countries⁵⁹; in Africa⁶⁰; and among migrant workers in Russia.⁶¹

Besides strengthening the reach of the international standards, these developments also highlight an intersection between the regulation of forced labour and working time, namely their shared concern about mandatory overtime. For by recognising certain forms of compulsory overtime as illegitimate, the CEACR has tapped into a broader unease about its nature and import. In developing countries, as has been seen, the dominant concern is about workers who are compelled to work very long hours, often without additional pay, to avoid losing the jobs that keep them out of poverty. In industrialised countries, the concerns tend to be those long associated with all forms of overtime and long hours work: their impact on worker health and safety;⁶² public safety;⁶³ and productivity.⁶⁴ Mandatory overtime is also relevant to the more recent policy objective of ensuring that working time arrangements do not inhibit workers in combining their jobs with other elements of their lives. Indeed, it can be expected to have a particularly deleterious impact on the conciliation of paid labour and life beyond work, given that the workers involved, by definition, do not choose these hours, and therefore might face difficulties in synchronising them with the myriad other responsibilities in their lives.

For parents in particular, being required to work beyond normal hours, especially at short notice, can involve considerable disruption. They may, for example, have to arrange for alternative childcare or transport for their children, with the related inconvenience and financial outlay. It is not surprising, then, that workers whose overtime is mandatory have been found to be more likely to report that work interferes with their family lives.⁶⁵ The impact of compulsory overtime, however, is not confined to workers with family responsibilities. It can restrict the involvement of all workers in any social, community or educational activity that needs to be planned in advance.⁶⁶ Moreover, the available evidence, from the US, is that the incidence of mandatory overtime work is increasing. A recent analysis of data from the 2002 General Social Survey found it to be noticeably more prevalent than twenty-five years ago, involving slightly over a quarter of those surveyed.⁶⁷

⁵⁸ International Labour Office, 'Global Alliance', above n 52, at para 136.

⁵⁹ International Labour Office, 'Global Alliance', above n 52, at para 178.

⁶⁰ International Labour Office, 'Global Alliance', above n 52, at para 216, citing the *Séminaire Sur les Normes Internationales du Travail et les Procédures Constitutionnelles*, 29 November - 1 December 2004.

⁶¹ International Labour Office, 'Global Alliance', above n 52, at 230, citing Tyuryukanova, E, 'Forced Labour in the Russian Federation Today' (ILO Moscow and SAP-FL, unpublished, 2004).

⁶² See Spurgeon, A, *Working Time: Its Impact on Safety and Health* (Geneva, International Labour Office and Korea Occupational Safety and Health Agency, 2003).

⁶³ See, eg Schuster, M, 'The Impact of Overtime Work on Industrial Accident Rates' (1985) 24 *Industrial Relations* 234.

⁶⁴ Eg Shephard, E and Clifton, T 'Are Longer Hours Reducing Productivity in Manufacturing?' (2000) 21 *International Journal of Manpower* 540.

⁶⁵ Golden and Wiens-Tuers, above n 50, at 9 and Table 7.

⁶⁶ Golden and Wiens-Tuers, above n 50 at 4.

⁶⁷ Golden and Wiens-Tuers, above n 50, at 9-10 and Table 7. The GSS survey question is 'When you work overtime, is it mandatory (required by your employer)?' About 26% of those surveyed faced the prospect of mandatory overtime, including about 28% of full-time workers.

In response to these kinds of concerns, mandatory overtime has begun to be addressed by working time laws.⁶⁸ In addition to the traditional techniques of overtime regulation (criteria for overtime work, minimum wage premia, hours limits), in some jurisdictions, legislation and collective agreements offer individual workers a right to refuse to work overtime hours. The strongest version of this right, exemplified by the Finnish working time legislation, entitles all workers to refuse any work beyond their normal hours.⁶⁹ In other regimes, rights to refuse to work overtime are available to specific groups, such as pregnant women, young workers or individuals who are experiencing health problems.⁷⁰ Also prominent among these measures are laws that require consent for overtime hours by workers who have caring obligations.⁷¹ Moreover, in some jurisdictions these kind of refusal rights represent the only bulwark against long hours. This is the case in the US, where, although the absence of maximum hours limits means that unlimited overtime can be required subject only to the payment of a wage premium,⁷² rights to refuse at least some overtime hours have been enacted in a number of states over the last 15 years, primarily due to the efforts of nurses' associations and unions.⁷³

The treatment of mandatory overtime, then, highlights the intersections between the regulatory fields of working time and forced labour, most obviously in that they share an understanding of this form of overtime as potentially abusive and worthy of regulation. This may raise a degree of concern, to the extent that the application of forced labour standards to mandatory overtime could be considered a dilution of the concept of forced labour, by extending it to work situations insufficiently coercive to compare to the problems traditionally captured by the human rights instruments.⁷⁴ Within the field of labour law, however, it has the distinct advantage of tying working time protections to another right widely viewed as more central to the pantheon of human rights and designated as fundamental within the ILO regime, thus reinforcing the national and international standards on long hours and overtime by bringing the weight of the forced labour regime behind them. This discussion has also highlighted, however, the potential of working time laws alone creatively to respond to evolving concerns about working life, in this case through rights to refuse to work beyond normal hours, which are intended to ensure that overtime is voluntary and thus to sidestep the problems that can arise when it is required. Moreover, these rights draw on a newly prominent theme in working time regulation, the notion that individual

⁶⁸ See further McCann, D (2007) 'Temporal Autonomy and the Protective Individualisation of Working-Time Law: The Case of Overtime Work' 17(3) *Labour and Industry* 29.

⁶⁹ *Työaikalaki* No. 605/1996 (Working Hours Act), s 18.

⁷⁰ These kinds of rights recall the suggestion in ILO's *Workers with Family Recommendation*, 1981 (No. 165) that consideration be taken in arranging overtime by young, pregnant, breastfeeding and disabled workers (para 18).

⁷¹ These include the Estonian *Working and Rest Time Act*, with respect to workers who care for children under 12 years of age, disabled children or invalids (§ 8(2)); and the Swiss *Loi sur le travail*, which requires consent from workers responsible for children until the age of 15 (Art 36(2)).

⁷² Under the federal legislation, the overtime premium is 50% of the ordinary wage. Fair Labor Standards Act of 1938, 19 USC §§ 207(a)(1) (2000).

⁷³ These include California, Connecticut, Maine, Maryland and West Virginia. These refusal rights are confined to the health sector, except in Maine, where the first universally applicable mandatory overtime law in the US permits all workers to refuse to work more than 80 hours of overtime in any two-week period (26 MRSA § 603). Lung, S, 'Overwork and Overtime' (2005) 39 *Indiana Law Review* 51.

⁷⁴ For a discussion of the interpretation of forced labour under the International Covenant on Civil and Political Rights, see Joseph in this volume.

workers should be entitled to a degree of choice over their working hours, which is being pursued from a number of directions and is the subject of the following section.

RIGHTS TO INFLUENCE WORKING HOURS: A CONVERGENCE OF REGULATORY TECHNIQUES

A further intersection between human rights and working time regimes is that both can be a source of rights for individual workers to influence the scheduling of their working hours. In contrast to the concerns about mandatory overtime discussed above, however, it has been in legal fields more commonly classified as part of human rights law that the notion that individuals should be able to change their work schedules first found legal expression. It is well-known that sex discrimination laws have been interpreted to permit mothers to change their working hours, primarily to enable them to work on a part-time basis. This development has been highly visible in UK sex discrimination law.⁷⁵

Less often recognised in the labour law literature, however, are the intersections between working time measures on individual choice and human rights laws that protect freedom of religion or prohibit discrimination on religious grounds. In a number of jurisdictions, workers have resorted to these human rights measures, with varying degrees of success, to argue that they are entitled to time-off to take part in religious services or to ensure that their weekly rest or leave periods coincide with the holy days recognised by their religious traditions. These kinds of arguments have been made under Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), for example, which embodies a right to freedom of religion, including to 'manifest [the] religion or belief, in worship, teaching, practice or observance.'⁷⁶ In other regimes, claims have been more likely to emerge under laws that prohibit workplace discrimination on religious grounds, as has been the case in Canada under human rights legislation.⁷⁷ Irrespective of their genre, however, the contention is that these rights encompass an obligation on employers to accommodate religious observance by permitting work schedules to be adapted, which can be achieved in a number of ways ranging from permitting reductions in lunch breaks in exchange for early departures, to arranging flexitime, shift swaps or lateral transfers.⁷⁸

These developments in human rights regimes have been more recently paralleled by an evolving concern within working time law that individual workers should be able to influence their working time arrangements. The outcome, particularly over the last decade, has been the introduction in both collective agreements and legislation of entitlements for individuals to change their working

⁷⁵ For a discussion of the development of the right to adjust working hours under sex discrimination law in the UK, see Conaghan, J, 'The Family-Friendly Workplace in Labour Law Discourse: Some Reflections on *London Underground Ltd v Edwards*' in H Collins, P Davies and R Rideout (eds), *Legal Regulation of the Employment Relation* (London, Kluwer Law International, 2000).

⁷⁶ *Ahmad v the United Kingdom* (App. No. 8160/78, 22 Eur. Comm'n H.R. Dec. & Rep. 27 (1981)); *Konttinen v Finland* (App. No. 249/49/94, 3 December 1996); *Stedman v UK* (App. No. 29107/95, 89-A Eur. Comm'n H.R. Dec. & Rep. 104, 107-8 (1997)).

⁷⁷ *Ontario Human Rights Commission v Simpsons-Sears* [1985] 2 SCR 536; *Alberta Human Rights Commission v Central Alberta Dairy Pool* [1990] 2 SCR 489.

⁷⁸ These are among the suggestions offered by the US Equal Employment Opportunity Commission, 29 CFR 1605 (1980).

hours.⁷⁹ A number of these measures embody a negative approach, in that they contain rights to refuse certain working time arrangements such as overtime, night work or work on weekly rest days. Others offer positive rights to influence work schedules more substantially including, most prominently, in the shape of entitlements that are available to parents. Parental leave schemes, for example, can grant rights to change working hours by permitting the leave to be taken in the form of reduced hours. And in some countries, these entitlements are available over much longer periods. In Sweden, parents have a right to work part-time until their children are eight years old;⁸⁰ and a right to request ‘flexible working,’ which encompasses both reduced hours and working from home, has been available in the UK since 2003 and now extends to parents of children under sixteen and carers of adults.⁸¹

This trend towards legislated rights to working time adjustments has culminated in the enactment of laws that extend not only to specified groups, but to all workers. One version entitles full-timers to priority in applying for part-time vacancies in their employers’ firms, and vice versa; others offer workers the right to alter their hours while remaining in the current posts. These latter measures were pioneered in Dutch collective agreements and introduced in legislation in the Netherlands in 2000⁸² and in Germany the following year.⁸³ More recently, this shift towards facilitating forms of working time flexibility primarily intended to benefit employees has been recognised and encouraged by the ILO’s CEACR. In its 2005 General Survey, the Commission identified certain factors that could be taken into account in any revised instrument on working time, including permitting individual workers to exercise a degree of choice over their working hours.⁸⁴

These rights to adjust working hours, then, mirror those offered under freedom of religion and discrimination laws, to the extent that both require adjustments in working hours. The working time laws are more direct, however, in that their primary purpose is to enable employees to alter their schedules. They thereby sidestep any question of whether such accommodation is required, which can arise under religious rights and has been highlighted by the failure to have working hours adjustments recognised under the ECHR. The European Commission on Human Rights rebuffed the argument that Article 9 protects workers dismissed for refusing to work in schedules that conflict with their religious beliefs, citing the freedom of these individuals to resign from their jobs, an act characterised in its decision in *Konttinen* as the ‘ultimate guarantee’ of the right to freedom of religion.⁸⁵

When this initial hurdle is overcome, however, a number of similarities emerge between claims for hours adjustments that are framed as religious rights and those brought under working time laws. Most obviously, the central question in both is the extent to which employers should be required to accommodate workers’ preferences. The legislative formulae that circumscribe this obligation vary, but in both kinds of regimes tend to take the form of a broadly-worded statement of what is expected of the employer and an indication of the limits of this requirement. Thus under human

⁷⁹ For more details on these measures, see Lee and McCann, above n **Error! Bookmark not defined.**. See also Collins, H, ‘The Right to Flexibility’ in J Conaghan and K Rittich (eds), *Labour Law, Work, and Family: Critical and Comparative Perspectives* (Oxford, Oxford University Press, 2005).

⁸⁰ *Föräldraledighetslag* (Parental Leave Act), section 7.

⁸¹ Employment Rights Act 1996, Part VIIIA.

⁸² *Wet op de aanpassing van de arbeidsduur* (Act on the Adaptation of Working Time).

⁸³ *Gesetz über Teilzeitarbeit und befristete Arbeitsverträge* (Act on Part-Time Work and Fixed Term Contracts).

⁸⁴ ILO *Hours of Work*, above n 40, paras 327 and 332(i).

⁸⁵ *Konttinen*, above n 76.

rights legislation in both the US and Canada, reasonable accommodation of employees' religious beliefs is required, provided it would not result in 'undue hardship' for the employer.⁸⁶ Similarly, most of the working time laws that provide for rights to adjust working hours mandate that employers must grant workers' requests for changes in their working hours, subject to a right to refuse on grounds identified in the legislation. One of the most strongly worded, for example, is the Dutch Act on the Adaptation of Working Time, which permits only 'serious business reasons' to trump requests to adapt working hours.⁸⁷

Decisions under both regimes, then, hinge on how these obligations are interpreted in specific cases, and the ways in which the interests of employers and employees are balanced in this endeavour. Although the courts are guided by the legislative texts, beyond these broad parameters the success of both kinds of claim depends to a substantial extent on whether courts are prepared carefully to scrutinise and evaluate the reasons offered by employers for persevering with the current schedule; and whether they view these arrangements as inherent in the job, or recognise that there may be alternatives. Given these similarities, the human rights and working time instruments and jurisprudence have the potential to inform each other, and the more highly developed working time laws are available as a model for future freedom of religion and anti-discrimination measures and to aid in the interpretation of the existing ones. In some jurisdictions, working time laws can also be accessed directly to advance religious rights, where workers are able to have recourse to universal entitlements to secure time for religious observance.

Moreover, working time and human right laws on accommodation and the approach they represent may also share a common future, in that they are likely to become increasingly significant in the context of current global economic trends. Among the developments associated with the globalising economy is that many employers are responding to increased competitive pressures by changing the organisation of working time, accompanied by pressures to establish a regulatory framework that permits work schedules to extend across all seven days of the week. These developments are generating tension in a number of the vast majority of jurisdictions in which a communal weekly rest period is designated by law and rest day work reserved for a limited number of sectors or occupations (certain industrial facilities, hospitals, the emergency services, tourism etc.).⁸⁸ In recent years, for example, the liberalisation of restrictions on rest day work have been the subject of controversy in countries as diverse as Chile, Hungary and Jamaica.⁸⁹

So far, the most prominent claims under religious rights have been initiated by workers whose holy days diverge from the customary or legally mandated rests days and public holidays. A prominent case under the ECHR, for example, involved a Muslim worker in the UK who had requested time-off to attend his mosque on Fridays⁹⁰; and the claims that have reached the Supreme Courts of both the US and Canada were brought by members of the Seventh-Day Adventist Church and the World Wide Church of God seeking weekly rest on Saturdays or leave on their

⁸⁶ This terminology is drawn from the US Civil Rights Act of 1964, Title VII (US) 42 USC § 2000e(j) (1994). A similar standard was adopted by the Supreme Court of Canada in *Simpsons-Sears*, above n 77.

⁸⁷ Art 2, ss 4 and 5, translation by SD Burri, HC Opitz and AG Veldman, 'Work-Family Policies on Working Time in Practice. A Comparison of Dutch and German Case Law on Working-Time Adjustment' (2003) 19 *International Journal of Comparative Law and Industrial Relations* 321, at 322.

⁸⁸ See also Lee, McCann and Messenger, above n 1.

⁸⁹ Lee, McCann and Messenger, above n 1.

⁹⁰ *Ahmad v the United Kingdom*, above n 76.

religious holidays.⁹¹ However, clashes between workers' holy days and their work schedules are not confined to these groups, and, given the logic of the trends outlined above, may arise more frequently among workers whose holy days coincide with the established or customary rest day. Indeed, a recent case before the UK Court of Appeal may prove to be a bellwether for future developments. In *Copsey v WWB Devon Clays Ltd*,⁹² a worker who objected to being required to work on a Sunday and was subsequently fired brought a claim that included an alleged breach of Article 9 of the ECHR.⁹³ Most significantly for present purposes, his predicament was precipitated by the introduction of a shift pattern that extended the operating hours of his employer's firm by substituting a Monday to Friday shift pattern with a seven day schedule. As this case suggests, rights to influence working hours may become an increasingly visible element of the regulatory landscape in countries in which they represent one of the few available defences against being required to work on a customary rest day.

CONCLUSION

The above discussion has sought to contribute to the ongoing evaluation of the potential of the human rights tradition to strengthen labour law by examining the interaction between these legal spheres with respect to one set of rights, those that entitle workers to decent working hours. By confining the analysis to this element of labour law, the objective has been to elicit more detail than is so far available on the interaction of the discourses and techniques of labour law and human rights law in this field. Moreover, this detail has been drawn from a subject, working time law, which is situated beyond what has come to be designated as labour law's 'core,' and therefore concerns rights that tend to be wallflowers in the debates about the relevance of human rights approaches. This analysis has revealed a substantial degree of overlap between the fields of human rights and labour law in the regulation of working hours, and made it possible tentatively to suggest a number of benefits for working time law, and perhaps by extension for labour law as a whole, from engaging more strongly with its human rights dimension. It is also possible to suggest certain lessons that human rights law can derive from the techniques and approaches of labour law and express some reservations about its contribution towards ensuring the viability of labour law in its current state of siege.

The faith invested by the ILO's CEACR in the status of working time protections as human rights reflects an intensification of this vision of labour rights in labour law discourse more generally, albeit in the shape of a relatively rare foray into the field of working time. There would be cause for concern were this approach entirely to displace equally compelling accounts of the role of working time laws, including those that stress their contribution to constructing economies that generate

⁹¹ *Trans World Airlines, Inc v Hardison* 432 US 63 (1977) and *Ansonia Board of Education v Philbrook* 479 US 60 (1986) (US); *Simpson-Sears and Central Alberta Dairy Pool*, above n 77 (Canada). The application before the European Commission on Human Rights in *Konttinen* was also brought by a member of the Seventh-Day Adventist Church, above n 76.

⁹² [2005] IRLR 811.

⁹³ Such claims can now also be brought under the UK religious discrimination legislation, the Employment Equality (Religion or Belief) Regulations 2003 and a number have been successful: see *Williams-Drabble v Pathway Care Solutions Ltd* [2005] ET/2601718/04; *Edge v Visual Security Services Ltd* [2006] ET/1301365/06; *Estorninho v Zoran Jokic t/a Zorans Delicatessen* [2006] ET/2600981/06.

quality jobs. However, it can clearly be of benefit to working time law, as to other labour law entitlements, to recall the compelling narrative offered by the human rights tradition, particularly when asserting the fundamentality of working time standards in the face of calls for them to be dismantled; an avenue that is not offered by discourses preoccupied with instrumental goals for labour regulation. Moreover, viewing working conditions rights, including those on working hours, through a human rights prism may have an additional potential, to avert, at least to some degree, the risk of marginalisation threatened by too strong a preoccupation with core rights.

The intersection of the fields of forced labour and working time found in their parallel initiatives to address mandatory overtime also suggests the value of harnessing the rhetorical force of human rights discourse to working time protections. The recourse to the forced labour standards to backstop working hours limits is valuable, in part, simply because it serves to expose one of the most severe and widespread abuses in the global economy, of workers who are compelled to work hours that can destroy their health and undermine the familial and social bonds that shape their lives. The recognition that mandatory overtime can constitute a form of forced labour, as well as offering this problem a more visible platform than available through working time law alone, also embodies a technical advance. It ushers in a joint approach whereby working time and forced labour instruments operate on the same problem, in this case by prohibiting long hours in domestic law while addressing at the international level the flouting of the domestic limits through required overtime.

The case of working time also reinforces the insight that rights that are not designated as fundamental or situated in human rights regimes can be the most effective. As Estlund has noted,

sometimes leaving the development of employee rights to lower and more local sources of legal authority yields rather ambitious and durable employee rights. Perhaps there is some trade-off between the aspiration to universality and the creativity and scope of legal rights – some tension between these two dimensions of 'fundamentality' in the nature of employee rights.⁹⁴

This observation is drawn from the US experience, but nevertheless illuminates the present discussion simply as a reminder of the significance of domestic labour laws, including their role, among others, as the primary enforcement mechanism for many human rights. Domestic working time measures in particular are a testament to the resilience of national labour law regimes, which have sustained, so far, a widespread floor of working hours standards in the face of profound and intensifying pressures to abandon them.

Also apparent, but perhaps worth stressing, is that even where both regimes offer avenues of recourse, it is often labour law, rather than human rights law, that embodies the most sophisticated mechanisms for protecting workers' interests. As has been pointed out in other contexts, human rights forums and techniques can be less responsive to the needs of workers than their labour law equivalents. This is illustrated in the working time arena by rights to adapt working hours, which appear to hold more promise for individuals who are unable to observe the practices of their religion than rights to freedom of religion or against religious discrimination, the directness and specificity of the labour law rights being their virtues. And it is also clear that it is entitlements beyond the realm of the fundamental that are the most

⁹⁴ Estlund, above n 8 at 209.

obvious means of preventing mandatory overtime, in the shape of rights to refuse to work beyond normal hours. Indeed, the experience in addressing both of these problems suggests a need for attentiveness to the advances made by labour law, so that its preoccupations, traditions and techniques can be drawn on to refocus and strengthen human rights law.

Finally, working time law is not immune to the concern that the integration of human rights discourses into labour law could threaten to undermine the latter's collective values and institutions.⁹⁵ The emerging individual rights with respect to overtime and scheduling can be seen as informed by one element of human rights discourse, the conviction that individuals, as autonomous beings, are entitled to exercise choice in shaping their lives; in this case, by transferring a degree of control over working hours to individual workers.⁹⁶ These laws are of value where 'collective' protections applicable in the same way to all workers, such as limits on overtime work or communal weekly rest days, do not adequately respond to individual needs. Caution should be exercised, however, as has been explored in more detail elsewhere, about the manner in which individual-choice rights are integrated into domestic regimes.⁹⁷ In particular, it is necessary to consider how these rights can reinforce and benefit from both laws that embody substantive protections and collective institutions, and to prevent individual rights from becoming accepted as a primary defence against long hours.

⁹⁵ See, eg Estlund, above n 8.

⁹⁶ Lung, above n 73 at 83.

⁹⁷ See Lee and McCann, above n **Error! Bookmark not defined..**